(3)

No. 88-275

In the Supreme Court of the United States

OCTOBER TERM, 1988

WHITE INDUSTRIES, INC., CARTHAGE AIRWAYS, INC. and EUGENE INGRAM,
Petitioners,

vs.

THE CESSNA AIRCRAFT COMPANY and CESSNA FINANCE CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SUMMARY OF REASONS WHY THE PETITION SHOULD NOT BE GRANTED

The judgment below was based on the factual finding that the Petitioners failed to prove that they were actually injured by reason of any violation of the antitrust laws. The judgment was affirmed unanimously by the Court of Appeals. The Petition does not address any issues that relate to this basis for the judgment but instead challenges factual findings on other issues. The Petition does not present any novel legal issues, does not raise any conflict between circuits and does not raise any matters of public importance.

STATUTES INVOLVED

In addition to the provisions cited by Petitioners, the pertinent provision of 15 U.S.C. §15 states as follows:

> (a) . . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . .

STATEMENT OF THE CASE

This litigation began in 1971 when Cessna Finance Corporation ("CFC") brought suit against White Industries, Inc. ("White") to collect the deficiencies after repossession of two aircraft that White had financed through CFC. 845 F.2d at 1498. (A.2). White responded by bringing an action, styled as a class action, against The Cessna Aircraft Company ("Cessna")[1] and a number of its distributors, objecting to the fact that the distributors purchased aircraft at a greater discount than did dealers. White further alleged that the distributors abused their greater discount by selling to persons who were not dealers under written contract to the distributors. White quickly entered into settlement agreements with all the distributors (aggregating approximately $145,000) and ultimately obtained approval from the district judge who

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1. Cessna is a subsidiary of General Dynamics Corporation. CFC and Cessna Citation Party Ltd. are subsidiaries of Cessna. Cessna also owns 49% of Reims Aviation, a French corporation.

sat during the 15-year pretrial phase of the case to use all the settlement proceeds for litigation expenses.

Trial finally commenced on March 4, 1984 and lasted ten weeks. The trial court heard from thirty-four witnesses and received over one thousand documents. *Id.* at 1498. (A.3). Reviewing the evidence on Cessna's Rule 41(b) motion for judgment, the trial court found that White and its co-plaintiff, Carthage Airways ("Carthage"), failed to prove actual injury by reason of any antitrust violation as required under the Clayton Act, 15 U.S.C. §15.

The trial court made findings concerning numerous contested factual issues. Reviewing the evidence regarding the distribution of Cessna aircraft, the court found that Cessna sold aircraft to distributors whose function was to act as wholesalers, re-selling to aircraft dealers. 657 F.Supp. at 691. (A.30-32). The court further found that the category of aircraft dealers included both dealers who had formal contracts with Cessna or with a distributor and dealers who, though not under contract, performed the retailing function of a dealer and, indeed, were often the principal competitors of dealers with contracts. *Id.* at 691, 704, 705. (A.30-32, A.60-64). In fact, the court found that dealers frequently went in and out of contracted status without changing their business function. *Id.* at 704. (A.60-61). Finally, although Petitioners assert that "there was actual competition between independent distributors and dealers for sales" (Pet. at 5), the trial court found that

> "the available evidence fails to show that either White Industries or Carthage Airways ever competed, in any meaningful way, in selling such aircraft to other dealers . . . ."

657 F.Supp. at 704. (A.62). White asserts that it was in competition for sales to Roy Horridge, whom it describes as a broker without facilities. (Pet. at 4, 5). In fact, Horridge was the operator of Mid-Continent Aircraft, located at the same airport as White, and whom White identified as its competitor. (Trial Tr. 4412-13, 5954, 6752, 6761). The trial court noted that dealers occasionally made accommodation sales to each other when an aircraft equipped a particular way was needed, but that such sales did not demonstrate the existence of a commercial dealer-to-dealer market. 657 F.Supp. at 705 n.26. (A.63 n.26).

Focusing particularly on the issue of actual injury, the trial court found that neither White nor Carthage had adduced any persuasive evidence that they had lost sales or profits as a result of any price discrimination or any sale by a distributor. *Id.* at 712. (A.79-81). As to lost sales, the trial court found that White and Carthage did not show evidence of any specific sale that they would have made but for competition from a distributor. *Id.* at 712, 713. (A.79-83). Examining the few instances where White even pointed to a particular sale, the court found that White did not have available aircraft that met the specific demands of the customers involved. *Id.* at 714. (A.83-86). As to lost profits, the trial court found that the Petitioners' evidence, based wholly on the opinion of an economist, was unpersuasive for numerous reasons. *Id.* at 712. (A.80-81). Those reasons included the fact that the opinion was based on factual premises that the court found false, such as the premise that there was a national geographic market for all aircraft. Also, the economist addressed only a hypothetical "average" dealer and admitted that he could not say how White

or Carthage were individually affected, even under his premises. 657 F.Supp. at 712. (A.81). Conversely, the court found that there was ample evidence to explain why the Petitioners were unprofitable, including an industry recession and poor business judgment, such as White's ill-conceived attempt to "corner the market" on one aircraft model. *Id.* at 713. (A.81-83).

Finally, with respect to Petitioners' Sherman Act claim, the court found that Cessna's close-out sale of non-current model aircraft was "inoffensive in and of itself" and rather than restraining competition in any way "stimulated aircraft sales of all sorts at all levels." *Id.* at 716. (A.88-89). Petitioners' assertion that the effect of those sales was to allow new models to be introduced at artificially higher prices was not accepted by the trial court, nor was it based on any evidence at trial.

The Court of Appeals considered all of Petitioners' objections to the findings of the trial court and held that none of the material findings was clearly erroneous. 845 F.2d at 1500, 1501, 1502. (A.7, A.9, A.12).

REASONS FOR DENYING THE WRIT

A. This Case Does Not Present Any Novel Issues of Law Under the Robinson-Patman Act, but Rather Involves the Application of Facts to Established Law.

Throughout the post-judgment and appellate process Petitioners have sought to evade the fact that the judgment against them rested on a purely factual determination that they had not, after ten weeks of trial, proved that they had incurred any actual injury by reason of

any of the acts they complained of. Below, they speciously challenged the trial court's detailed and lengthy opinion as being insufficient under Rule 52(a), which the Court of Appeals properly rejected out of hand. 845 F.2d at 1502. (A.11). Petitioners' Rule 52(a) attack was simply a ruse to dispute the findings of fact. *Id.* at 1499. (A.4). So here, Petitioners purportedly assert legal issues, when they actually seek another review of specific facts and the application of facts to established law, neither of which is properly sought before this Court. *See Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

In reaching its determination on actual injury, the trial court applied the teachings of this Court in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981), and those in *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581-82 (5th Cir.) (on remand), *cert. denied*, 459 U.S. 908 (1982), that actual injury cannot simply be inferred from a price discrimination, but requires a showing of lost profits or diverted sales causally linked to a violation. The trial court's judgment rests on its assessment of the evidence under those principles.

Nor do the subsidiary issues raised by Petitioners here involve novel legal questions. The lawfulness under the Robinson-Patman Act of price differentials based on functional levels in a chain of distribution has long been recognized. For example, in *General Foods Corp.*, 52 F.T.C. 798, 824 (1956), the Federal Trade Commission observed:

> "While the Robinson-Patman Act does not mention functional pricing, it was written nevertheless against the background of the distribution system then in

> effect. As pointed out by respondent, a seller is not forbidden to sell at different prices to buyers in different functional classes. . . ."

This Court has long recognized the existence and legitimacy of functional discounts. In *FTC v. Ruberoid Co.*, 343 U.S. 470, 475 (1952), the Court recognized the legitimacy of functional discounts, but also affirmed the Commission's disregarding Ruberoid's labeling of firms as "wholesalers" or "applicators" where the label cloaked the real functional position of a firm.

The trial court in this case did not simply accept labels; rather, the court analyzed all the relevant evidence and concluded that the distributors were functioning at the wholesale level and that dealers, both those with contracts and those without, were functioning at the retailer level with respect to aircraft purchased for resale. 657 F.Supp. at 703-07. (A.60-67). This was a factual conclusion, not a holding as a matter of law, and was amply supported by the evidence. Contrary to Petitioners' suggestion, the decision below does not conflict with decisions in the Seventh Circuit. Both courts of appeal follow the principle that the facts, not labels, govern the placement of a firm in the chain of distribution for purposes of analysis of functional discounts. Differences in result simply arise from the differences in the facts of the respective cases. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923).

Petitioners also assert that FBOs (meaning non-contracted dealers) are not even within the Cessna distribution system. (Pet. at 13). By this, Petitioners mean that FBOs were not formally recognized by Cessna, although the evidence showed that they functioned as retail dealers.

Contrary to the teaching of *Ruberoid*, Petitioners demand that the labels or organization plan used internally by a manufacturer supercede the actual facts of the marketplace. Indeed, Petitioners would attack the trial court's fact-finding by having this Court declare as a matter of law that dealers without contracts must be barred from purchasing on the same terms as their competitors, dealers with contracts. The Robinson-Patman Act requires no such disfavoring of "unauthorized" dealers. The rule of law sought by Petitioners would simply favor one group of competitors over another, and thereby impair competition. As the trial court observed, the antitrust laws are intended to protect competition, not a particular group of competitors. 657 F.Supp. at 705 (A.65); *accord, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

The second subsidiary area that is addressed by the Petitioners is the trial court's finding that distributors and their affiliated dealers were not to be treated as a single entity. The trial court found that there was not sufficient evidence of domination and control, or evidence of passing on of the distributor's discount, to disregard the firms' separate corporate existences.

Petitioners concede that there is no automatic rule that affiliated firms be lumped together in Robinson-Patman Act cases. Rather, Petitioners state that the proper test is to determine the degree of control that the parent had over the policies, objectives, and practices of the affiliated companies. (Pet. at 14). This inquiry does not differ from that made in any case involving "piercing the corporate veil." In the present case, the trial court considered the line of cases cited here by Petitioners. (Pet. at 14). 657 F.Supp. at 707-08. (A.68-70).

All of those cases involved findings based on the particular facts of the case, which the trial court found to be different from the facts of the present case. 657 F.Supp. at 708 n.32. (A.70 n.32). The burden was on Petitioners to prove that the separate corporate status should be disregarded, and the trial court found that Petitioners' evidence did not demonstrate such control as to justify disregarding the separate entities. Petitioners did no more than adduce evidence of varying degrees of overlapping of ownership, directors or officers, and in one instance a sharing of accounting services. *Id.* at 707. (A.68). As the trial court concluded: "Since plaintiffs' evidence entirely fails to address the 'domination' test posed by [the] rule, their general argument is without merit." 657 F.Supp. at 707. (A.69). In sum, Petitioners do not raise a legal issue here, but only seek review of the evidence under the very rule applied below.

B. This Case Presents No Novel Issues of Law Under the Sherman Act but Rather Involves a Routine Application of the Rule of Reason to the Evidence.

In the trial court Petitioners argued that Cessna and its distributors violated the Sherman Act by agreeing that Cessna make sales to distributors at prices that were more favorable than Cessna's sales to dealers. This is the alleged "vertical conspiracy" referred to by the district court, 657 F.Supp. at 715-16 (A.86-89), since it only involves Cessna in its role as manufacturer. The court properly followed *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983), in rejecting this "conspiracy to violate the Robinson-Patman Act" theory. Moreover, the trial court

found that Petitioners' failure to prove actual injury vitiated any theory they had under the Sherman Act. 657 F.Supp. at 715. (A.87-88).

Petitioners have abandoned this Sherman Act theory and on this petition argue only that certain bulk sales of aircraft at year-end to one distributor on negotiated terms constitute a violation of the Sherman Act, allegedly by enabling Cessna to raise the price of the succeeding year's models. This theory does not present a properly reviewable issue.

First, there was no evidence whatever that Cessna and the distributor made any agreement as to the prices that Cessna would charge for the succeeding year's new models. The only agreement was as to the terms of the sale from Cessna to the distributor which is the type of agreement that is part of every sale. Likewise, the only agreement regarding credit terms was the agreement about the financing terms for the sale of the aircraft by Cessna to the distributor. Petitioners' citation of *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (Pet. at 19), is inapposite and misleading. In this case, unlike the *Catalano* situation, there was no claim, much less evidence, that Cessna and the distributor agreed upon credit terms that each would make available to others.

Second, there was no evidence (not even from Petitioners' discredited economist) that the terms of the close-out sales affected prices for subsequent new model aircraft, much less was the subject of agreement between Cessna and the distributor. Petitioners' theory of artificially enhancing prices is nothing but the speculation of Petitioners' counsel.

Third, there was no evidence that Cessna agreed with the distributor not to offer the close-out aircraft or special terms to dealers. That Cessna did not provide those particular terms to Petitioners does not imply that Cessna's action was the product of an agreement, and thus there was no evidence of a group boycott as in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

Fourth, even if Cessna and the distributor were properly characterized as competitors, a sale of goods from one to the other is not prohibited by the Sherman Act, nor is the agreement of terms of the sale a "per se" violation. Petitioners suggest that all agreements between "horizontal" competitors are "per se" violations of the act to which the Rule of Reason does not apply. To the contrary, the Rule of Reason was developed in the context of an agreement among competitors. *Board of Trade of Chicago v. United States,* 246 U.S. 231, 237-38 (1918). Thus, regardless of the characterization of Petitioners' claim as horizontal or vertical, the trial court properly considered whether the transaction challenged tended to promote or suppress competition, and concluded that the sales were pro-competitive. 657 F.Supp. at 716. (A.88-89). That a sale might indirectly affect some other transaction does not make the sale *per se* illegal, even if between competitors. For example, every sale price has some influence on subsequent resale prices since resales are normally at a higher price, but that has never been deemed to make the initial sale a violation of the Sherman Act, absent an agreement as to what the resale price would be. *See, e.g., Butera v. Sun Oil Co.*, 496 F.2d 434, 436 (1st Cir. 1974).

Finally, Petitioners had the burden of proving actual injury under their Sherman Act theories as well as under their Robinson-Patman Act claim. The trial court found that Petitioners had failed to prove actual injury in connection with any Sherman Act theory. 657 F.Supp. at 715. (A.86-87).

C. This Case Presents No Issues of Public Importance.

This case had been pending for over sixteen years primarily due to Petitioners' attempt to have a complex Robinson-Patman Act case treated as a class action. The Cessna distribution system, in terms of its dual structure was unique, *see In Re Piper Aircraft Distrib. System Antitrust Lit.*, 405 F.Supp. 1402, 1403 (J.P.M.L. 1975), and prior to the trial Cessna eliminated the distributor side of its system, mooting Petitioners' claim for injunctive relief. 657 F.Supp. at 690 n.3. (A.28 n.3). Accordingly, while Petitioners remain interested in resurrecting their damage claims, this case is academic in terms of the future distribution of aircraft. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Petitioners have not even attempted to argue that this petition presents matters of importance to the public, not just to themselves. *See Layne & Bowler Corp. v. Western Well Works, Inc., supra,* 261 U.S. at 393. After these sixteen years, in which Petitioners had every conceivable opportunity to develop their case, this litigation should be put to an end.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

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